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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 749

WILLIAM JOHN McCARTHY and JAMES ROCCO MIRAGLIA,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, William John McCarthy and James Rocco Miraglia, respectfully pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit entered on December 6, 1961. The petition for rehearing was denied on January 29, 1961.

JUDGMENT AND OPINION OF COURT BELOW

The judgment of the District Court for the Northern District of Illinois was entered on March 2, 1961, sentencing the defendants to imprisonment for a term of two years. The District Court case is not reported, but the judgment appears at page 1 of the Appendix certified to this Court by the Clerk of the Court of Appeals.

The Opinion of the Court of Appeals for the Seventh Circuit affirming said judgment was filed December 6, 1961; the petition for rehearing was denied on January 29, 1962. The Opinion appears in the Appendix hereto, and in the certified copy of the Record. The Opinion is not yet reported.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S. Code 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. May a judgment of conviction be allowed to stand when it is predicated upon the use of fingerprints illegally obtained from the defendant by a novel method of illegality used by the FBI agent who threatened the defendant that unless he would accompany the agent to the FBI headquarters and be fingerprinted that the City of Chicago police would make an arrest of the defendant and the agent would obtain the fingerprints anyway?

2. May an agent of the Federal Bureau of Investigation threaten a defendant with arrest by city police, working in conjunction with the agent, in order to coerce the defendant "voluntarily" to accompany the agent to the

FBI headquarters for the purpose of taking fingerprints? Is not the use by the government of such prints, introduced into evidence over the objections of the defendant that they were illegally obtained, a violation of the Fourth and Fifth Amendments to the Constitution?

3. May the holdings of this Court in *Elkins* v. *United States*, 364 U.S. 206 and *Rios* v. *United States*, 364 U.S. 253, be vitiated by agents of the FBI who threaten a suspect with a state arrest if the suspect does not "voluntarily" accompany the agent?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. Fourth Amendment to the Constitution.
2. Fifth Amendment to the Constitution.
3. Section 2113, Title 18, U. S. Code.

The pertinent provisions appear in the Appendix hereto.

STATEMENT OF THE CASE.

Petitioners were convicted in a bench trial of robbing the president of the Almira Savings and Loan Association, Chicago, of the amount of $5,000, which money belonged to the association, and which was insured by a federal agency in violation of Title 18, Section 2113, U. S. Code (A. 1). Each petitioner was sentenced to a term of two years in the custody of the Attorney General (A. 1).

The error relied on relates to the refusal of the trial court to suppress the use of fingerprints of the petitioner McCarthy taken from him by an FBI agent upon the agent's threat that unless petitioner submitted to the agent, the city police would arrest McCarthy and the agent would obtain the prints anyway.

As the victim had doubts about the identity of McCarthy as the person who robbed him (A. 5-6), the fingerprints of McCarthy, Government Exhibit 23, were vital to the conviction inasmuch as such prints were compared with prints lifted from the window glass of the automobile driven by the victim (A. 10 and 25).

When McCarthy moved to suppress Exhibit 23 on the grounds that his prints were taken in violation of his Constitutional rights (A. 19) a hearing was held upon said motion. (A. 19-24).

Mrs. Ann Comforti testified she was the mother-in-law of defendant McCarthy and that at about 3:30 P.M. on June 15, 1960, Agent Shanahan came to her apartment at 4336 Gladys Avenue, Chicago. Her husband Stanley, the defendant and her daughter were present. Shanahan told McCarthy that he wanted the defendant to come downtown

because he wanted to question the defendant and take fingerprints. McCarthy asked Shanahan if he had a warrant for his arrest and when Shanahan replied in the negative, McCarthy stated that he did not have to go with the agent. Whereupon Shanahan stated that if the defendant did not go with him he would have the police come and get him. It was then that McCarthy agreed to go with the agent. (A. 19).

Mrs. Betty McCarthy, wife of defendant, testified that on June 15, 1960, Shanahan came to the apartment and told the defendant that he wanted to talk to him. Her husband said, "Sit down and talk", but Shanahan said "No, I want you to go downtown. I want your fingerprints." McCarthy refused to go and Shanahan said, "If you don't come with me, I will have the police come and take you-and you know what that means . . ." Whereupon defendant stated, "If you put it that way, I will come with you." (A. 19-20).

Stanley Comforti testified that when Shanahan came to the apartment, he talked to McCarthy and told McCarthy to come downtown so they might take his fingerprints. McCarthy asked if he were under arrest and upon being told by Shanahan that he was not, McCarthy said, "Well, I won't go then." Shanahan then said, "Well, if I come back with the officers you can stay in jail over night. You are better off to go now." Whereupon, McCarthy replied, "Well, if that is the case, I might as well go with you now." (A. 20).

McCarthy testified as follows:

> "Mr. Shanahan had been by my house a few other times, Your Honor, when I was never at home. But this day I was at home and he wanted to talk to me. I said, 'Sit down and let us talk'. He said, 'I want to

talk with you downtown at the F.B.I. office'. For what, you want to take my fingerprints or my pictures?' I told him, I am not going. He didn't have a warrant. I asked if I was under arrest and he said, 'You are not under arrest.' I said, if I am not under arrest and you don't have a warrant, I don't have to go. He told me I could go with him or he said he would have the bureau pinch me, the detective bureau. I know what that means. I will wind up there over night, and I know the treatment I will get there. You know, if I have to stay over night then I have to judge between the lesser of the two evils. If I went with them he promises me I would come home right away. So I went with him. He took me down there and took not only my prints but they took my palm prints." (A. 21).

Upon cross examination McCarthy said the agents treated him nicely while he was at the F.B.I. Headquarters. When the prosecutor asked McCarthy if he was forced, McCarthy replied, "Your Honor, I was forced. They didn't twist my arm or anything but I was forced to go there whether five minutes or five hours". (A. 22).

GOVERNMENT'S EVIDENCE IN REBUTTAL ON THE MOTION TO SUPPRESS

In rebuttal, F.B.I. Agent Shanahan testified he went to the apartment at 4336 Gladys Avenue on June 15, 1960 at about 3:30 P.M. and saw McCarthy and his father-in-law, Mr. Stanley Comforti. At no time did he make any threat to McCarthy in order to force or coerce him to come to the F.B.I. office. He did not tell McCarthy to come with him or that he would have the police come down and get him. He drove McCarthy to the F.B.I. headquarters and he also drove the defendant back to his apartment. (A. 22).

On cross examination Shanahan said he had been to the apartment several times before and had spoken to both Mrs. McCarthy and Mrs. Comforti. On this occasion he did tell McCarthy that if McCarthy were arrested for any local crime, particularly this one, it would be no problem for him to get prints from the local police. (A. 23).

Several months before this Shanahan had gone to the home of defendant Miraglia for the purpose of making the same invitation to come to the F.B.I. headquarters in order to give his prints, but Miraglia refused to do so. A few weeks later, Shanahan received Miraglia's prints from the Chicago Police Department. He was told by Lt. Higgins of the Chicago Detective Bureau that Miraglia was invited into headquarters. He learned this upon one of his regular visits to the police headquarters at 1121 South State Street. He did not learn that the police did not even charge Miraglia with a crime and that after they picked him up and fingerprinted him, they then released him. (A. 24).

(At the time when the Government originally attempted to introduce Exhibit 23, the inked palm impression of McCarthy taken on June 15, 1960, Shanahan testified as follows):

Shanahan said that he had gone to McCarthy's house on June 15, 1960, at about 3:30 P.M. and he spoke to McCarthy and McCarthy's father-in-law, Stanley Comforti. He accused McCarthy of robbing Churan on September 18, 1959. McCarthy said he did not want to talk about that, nor did he want to talk about a car which was parked in a garage at 954 North Pulaski. Shanahan asked McCarthy about the 1959 Chevrolet and McCarthy would not talk about that.

"I asked McCarthy if he would care to accompany me down to the office, . . . He said 'no' he wouldn't come down there, because if I took pictures of him, I would just show them to the witnesses and he wasn't going to help me put him in jail.

"I told him that it wasn't much a problem to get pictures and fingerprints of him inasmuch as the violation for which I was—about which I was talking to him was also a local violation, and that in all probability the Chicago Police Department was equally interested in him and they could pick him up, in which case, if they did, and fingerprinted and photographed him, I would have those made available to me through the normal course of business.

"At that point, he accompanied me down to our office. I drove him down from his home or where he was living, to our office." (A. 13-14)

At the time he took McCarthy to the office of the F.B.I. there was no arrest warrant or any process outstanding against McCarthy. (A. 14).

REASONS FOR GRANTING WRIT.

Rudolph Churan was robbed of $5,000 belonging to Almira Savings and Loan Association. The issue in the case revolved around the identification of the two men who robbed him. Churan was shown pictures of individuals by the F.B.I. agent on at least six occasions (A. 4). He had doubts about McCarthy. (A. 5-6).

Agent Shanahan suspected Miraglia and McCarthy. He had gone to Miraglia's house in January, 1960 to inquire about the robbery (A. 12-13); but he made no arrest then. He went to the home of McCarthy several times seeking McCarthy and he made phone calls to the home, without success. (A. 16). On June 15, 1960, he succeeded in talking to McCarthy. (A. 13).

Up to this time Churan was never confronted with McCarthy and Miraglia. It was only after the palm print of McCarthy, taken illegally, was compared with a print, Exhibit 15-A, taken from the broken window of Churan's car, that Shanahan arrested McCarthy. *Then* there was a show up. At the only show up where Churan appeared in which McCarthy was present Churan made up dubious and highly doubtful identification of McCarthy. Churan said he had some doubt about McCarthy. (A. 5). He also said that he had expressed that doubt, but he did not know to whom. (A. 6).

There was no other evidence in the whole of the Record by which McCarthy could be tied to the robbery. If the fingerprint card, Government Exhibit 23, were suppressed as McCarthy requested in his motion, there could be no conviction, because, the case is markedly weak and

the evidence insufficient to sustain the finding of guilty without the palm print identification, which palm print was illegally obtained.

It will be clearly demonstrated how agent Shanahan forced McCarthy to accompany him to F.B.I. headquarters and forced McCarthy to give him the palm print. The coercion and force were subtle, but nonetheless, real. It must be remembered that until the print was obtained Shanahan only suspected McCarthy; he had no proof that might be demonstrated to be reasonable grounds for arresting McCarthy. For if he had, he would certainly have made an arrest.

After Shanahan failed several times to reach McCarthy, he finally found the defendant home. During the case in chief, Shanahan testified he told McCarthy he suspected McCarthy of the Churan robbery (A. 13). McCarthy would not talk about the robbery (A. 13).

> "I asked Mr. McCarthy if he would care to accompany me down to the office which I said before was still located at 212 West Monroe at that time. He said no, he wouldn't come down here, because if I took pictures of him, I would just show them to the witnesses and he wasn't going to help me put him in jail.
>
> "I told him that it wasn't much of a problem to get pictures and fingerprints of him inasmuch as the violation for which he was—about which I was talking to him was a local violation, and that in all probability the Chicago Police Department was equally interested in him and they could pick him up, in which case, if they did, and fingerprinted and photographed him, I would have those made available to me through the normal course of business.
>
> "At that point, he accompanied me down to our office. I drove him down from his home, or where he was living, to our office." (A. 13-14)

Thereafter the defendant's fingerprints were taken and he was also photographed.

During the hearing on the Motion to Suppress the Evidence, McCarthy's father-in-law and mother-in-law, Mr. and Mrs. Comforti, and Mrs. McCarthy all testified they heard Shanahan threaten McCarthy that if he did not accompany the agent, Shanahan would have the local police pick him up. (A. 19-20).

McCarthy himself testified that he refused to accompany Shanahan until Shanahan threatened that the city detectives would arrest him. He chose the lesser of two evils. (A. 21).

Shanahan testified that earlier he had gone to Miraglia's house to "invite" Miraglia to accompany him to F.B.I. headquarters for the purpose of taking prints. Miraglia refused. Miraglia was later arrested by the city police, printed, and Shanahan received the prints. (A. 23-24).

The legal problem involved is whether the agent, by his veiled threats, while in an atmosphere lending itself to tension, impliedly coerced McCarthy involuntarily to accompany him to the F.B.I. office and there involuntarily to incriminate himself, thus denying defendant's Constitutional rights under the Fourth and Fifth Amendments.

> "Unless the courts are prepared to enforce these rights and protect those charged with crime, irrespective of their obvious guilt, they condone illegitimate and unconstitutional practices, which if long adhered to, may result in a breakdown of the protection accorded free men by the Fourth and Fifth Amendments." *Brock v. United States*, 223 F. 2d 681, 684. (See also *McDonald v. United States*, 335 U.S. 451.

In *United States v. Hoi*, 126 F. Supp. 755, officers entered the defendant's premises without authority purportedly for the purpose of discussing reports that the defendant

was violating the narcotic law. Once on the premises the officer had asked to look at the defendant's arm, whereupon the defendant obliged, thus incriminating himself. The Court suppressed this evidence, holding that the submission was involuntary, although defendant obliged.

In *United States v. Baldocci*, 42 F. 2d 567, officers arrested the defendant at a point some distance from his residence. The officer asked defendant where he lived and defendant refused to say. The officer then stated that he knew where the defendant lived and ordered the defendant to drive there. In reversing a conviction for possession of illegal narcotics found in the home the Court ruled that "consent" to search the home had not been given. The Court stated, p. 568,

> "The Government contends that defendant Belli waived his constitutional right when he gave his consent to the search of his residence. The facts show that, whatever consent was given, it was under the implied coercion here presented. (Defendant was under arrest on the street. The agent asked, 'Will you allow me to enter, or will I go and obtain a search warrant?' or words to that effect. Belli answered: 'All right, you may enter,' or *words to that effect.*) There is no doubt but that defendant was influenced by his situation, and, when all the surrounding circumstances are considered in their true relations, not only is the claim that consent was voluntary overthrown, but the impressions irresistibly produced that it must necessarily have been the result of either hope or fear, or both, operating on the mind."

It is evident from the cases cited that the surrounding facts and circumstances of an arrest, the "voluntariness" of a person's compliance with articulated requests for admittance into houses, for example, or for the surrender of things upon request are to be set against the background of the presentation by the officer of his authority as policeman.

In the instant case, Agent Shanahan had come to the house of McCarthy three or four times looking for him. (A. 23) Shanahan pursued the chase. Finally Shanahan found McCarthy at home and "invited him" to F.B.I. headquarters for the purpose of being fingerprinted. McCarthy remonstrated that he would not so accompany the agent and asked the agent if there was a warrant for his arrest. No, replied Shanahan, but the city police might be interested in you also, because this Federal violation which I am investigating and for which crime I suspect you of committing is also a local (that is, state) violation and if the local officers arrest you they will fingerprint you and photograph you and it is an easy thing for me then to get the fingerprints.

What Shanahan in effect was saying was that if McCarthy did not come with him, the city police would arrest McCarthy. The Federal officer "was nice". (A. 22). He would not arrest without a warrant or without specific facts upon which to predicate his arrest; but he was not remiss at obtaining evidence which might have stemmed from the illegality of contact by State officers. Agent Shanahan was undoubtedly operating under the "Silver Platter" doctrine, whereby the illegal actions of State officers in obtaining evidence did not deter Federal officials from using such evidence in a Federal prosecution, absent specific cooperation in the obtaining of such illegal evidence. But Shanahan's operational theory has now been overruled by this Court in the recent pronouncements of *Elkins v. United States*, 364 U.S. 206 and *Rios v. United States*, 364 U.S. 253.

It is interesting to note that when Shanahan was being cross-examined with respect to his knowledge about any outstanding warrant that the local officers had with re-

spect to the crime under investigation, he replied that he knew of no warrant or arrest process outstanding against McCarthy (A. 14).

At least, the *receiver* of the implied threat McCarthy thought it to be indeed a threat of arrest. McCarthy refused to call Shanahan when so invited to do. He refused to accompany Shanahan when so invited to do. He inquired whether Shanahan had a warrant for him. He asked if he were under arrest by virtue of legal process. It was only after Shanahan had voiced the veiled threat that McCarthy acceded and then accompanied Shanahan.

A host of cases have condemned the conduct of Shanahan. In the first case of implied coercion, *Boyd v. United States*, 116 U.S. 616 (1847) this Court held that force is a material ingredient for an unreasonable search or seizure, though this need not be physical force, but such force is present when a Legislative Act requires the accused to produce certain evidence.

In the landmark case of *Amos v. United States*, 255 U.S. 313, it was held that implied coercion existed where government officers came to the home of defendant, who was not there, and told his wife that they had come to search the premises for violation of the Revenue Law. The wife then admitted the officers and a search ensued. This Court held, p. 317:

> "Contention by the government that the constitutional rights of defendant were waived when his wife admitted to his home the government officers who came, without warrant, demanding admission to make search of it under government authorities cannot be entertained. We need not consider whether it is possible for a wife, in the absence of her husband, thus to waive his constitutional rights, for it is perfectly clear that, under the implied coercion here presented, no such waiver was intended or effected."

In *Nelson v. United States*, 208 F.2d 505, the defendant was convicted of violation of lottery laws. One of the defendants, appeared without counsel before the Senate Crime Investigating Committee under compulsion of subpoena. The Committee, without advising him of his rights to counsel and against self-incrimination, threatened prosecution for contempt if he refused to answer, for perjury if he lied, and for gambling activities if he told the truth, and, with the warning that he was still under subpoena, directed him to lead a policeman to his home. The papers seized in the home were obtained as a result of an illegal search and seizure and were inadmissible. The trial court held that the defendant had "voluntarily turned over" the papers to the Committee.

However, the Appellate Court reversed the trial court and cited *Judd v. United States*, 190 F. 2d 649.

While Judd was under arrest he was asked whether "he minded (the police) going over to his room and taking a look, and he said no . . . He said he had nothing to conceal or hide out there and it was perfectly all right for (them) to go out there." *Nelson*, citing from *Judd*, pp 650-65, stated:

> "Searches and seizures made without a proper warrant are generally to be regarded as unreasonable and violative of the Fourth Amendment. True, the obtaining of the warrant may on occasion be waived by the individual; he may give his consent to the search and seizure. But such a waiver or consent must be proved by clear and positive testimony, and it must be established that here was no duress or coercion, actual or implied. (1) The government must show a consent that is 'unequivocal and specific' (2), 'freely and intelligently given.' (3) Thus 'invitations' to enter one's house, extended to armed

officers of the law who demanded entrance, are usually to be considered as invitations secured by force. (4) A like view has been taken where an officer displays his badge and declares that he has come to make a search (5), even where the householder replies 'All right.' (6) A finding of consent in such circumstances has been held to be "unfounded in reason." (7) Intimidation and duress are almost necessarily implicit in such situations; if the government alleges their absence, it has the burden of convincing the court that they are in fact absent.

"This burden on the government is particularly heavy in cases where the individual is under arrest. Non-resistance to the orders or suggestions of the police is not infrequent in such a situation; true consent, free of fear or pressure, is not so readily to be found. (8) In fact, the circumstances of the defendant's plight may be such as to make any claim of actual consent 'not in accordance with human experience', and explainable only on the basis of 'physical or moral compulsion'. (9)

"(1) *Amos* v. *United States*, 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654; *United States* v. *Kelih*, D.C.S.D. Ill. 1921, 272 F. 484.

. . . . .

"(9) *Ray* v. *United States*, 5 Cir., 84 F.2d 654, 656."

As it was said in *Nelson*, essential to an appraisal is an evaluation of the influence at work upon *Nelson* when he turned over his papers. Essential here also is an evaluation of the influences at work on McCarthy when he "consented" to accompany Shanahan to the FBI headquarters for the purpose of giving his prints. Shanahan had been to the home two or three times. He had called and left his telephone number with the request that McCarthy call him. McCarthy never did. As Shanahan stated, McCarthy refused to go with him at first invita-

tion because McCarthy would not aid the government in putting him in jail. What then persuaded McCarthy to change his mind? The influences that were at work upon McCarthy, of course. What influences? The implied threat by Shanahan that if McCarthy did not "voluntarily" accompany him, that the city police were also "interested" in the case, because it was a local violation, and *if* the city police arrest McCarthy that it would then be an easy matter to get McCarthy's prints.

We direct attention to what happened to Miraglia. Shanahan likewise went to Miraglia's house and invited Miraglia to accompany him to the FBI headquarters (A. 23). Miraglia refused (A. 23). Later Miraglia was arrested by the city police, finger printed, mugged and turned loose without any charge being placed against him. (A. 18 and 23-24).

Coincidence of treatment? Perhaps. Pattern of conduct by Shanahan? More likely.

As the court said in *Nelson*, p. 513:

> "To find that this assent was 'freely and intelligently given' would be 'not in accordance with human experience' (*Ray* v. *United States*, 5 Cir., 84 F.2d 654, 656). We cannot escape the conclusion that his acquiescence in the search and seizure is explainable only on the basis of 'physical or moral compulsion' (*Judd* v. *United States, supra*)."

The decision in *Nelson* is suggestive of what this Court should hold, for *Nelson* stated that it would have been futile for the government to contend that the defendant voluntarily agreed to lead a policeman into his home and voluntarily gave him incriminating figures (p. 573).

Similarly, we respectfully submit that it is futile for the government in this case to contend that after McCarthy evaded Shanahan, refused to telephone him, refused to accompany Shanahan when first invited, that it was anything less than coercion which compelled McCarthy to accompany Shanahan.

The conduct of Agent Shanahan exhibits a new and subtle approach to the invasion of Constitutional rights. Because the courts have condemned repeatedly the heavy hand of the arm of law without proper warrant or without the possession of those facts giving rise to reasonable belief that a crime in fact was committed and that the person arrested had committed the crime, the new methodology apparently is to make veiled threats and suggestions of force by other agencies of the Government, as was done here in no uncertain terms. Constitutional immunities are not to be whittled away by different approaches of evading the mandates of both the Constitution and of the Courts which have interpreted the immunity sections therein.

The facts here do not demonstrate that clear and unequivocal voluntariness about which the cases speak of before evidence, such as here obtained, may be admitted.

Although the facts here are novel, the application of law to such facts are not. In repeated instances of challenge to the illegality of method by which such evidence was obtained the federal courts have been zealous in their strict observance of the Constitution.

We urge upon this Court the determination that Shanahan's articulated suggestions could be interpreted in no other manner than as a threat, and that McCarthy's "voluntary" accompaniment of Agent Shanahan was induced by threat and coercion.

UNDER THE HOLDING IN McDONALD v. UNITED STATES, 335 U.S. 451, at 456, the CONVICTION AS TO PETITIONER MIRAGLIA IS TAINTED.

Inasmuch as petitioner Miraglia was jointly tried with McCarthy and the introduction into evidence of McCarthy's prints adversely affected the consideration of the evidence on his behalf, the conviction against him should likewise be reversed. *McDonald v. United States*, 335 U.S. 451. Your Honors stated, at p. 456,

> "Even though we assume, without deciding, that Washington, who was a guest of McDonald, had no right of privacy that was broken when the officers searched McDonald's room without a warrant, we think that the denial of McDonald's motion was error that was prejudicial to Washington as well."

Accordingly, if McCarthy's prints were introduced into evidence illegally, the conviction against Miraglia is likewise tainted.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for Petitioners

APPENDIX A.

In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1961—SEPTEMBER SESSION, 1961

Nos. 13371-13372

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
WILLIAM JOHN MCCARTHY and JAMES ROCCO MIRAGLIA,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

December 6, 1961

Before DUFFY, KNOCH and CASTLE, *Circuit Judges*.

CASTLE, *Circuit Judge*. Defendants William John McCarthy and James Rocco Miraglia were convicted in a bench trial on an indictment charging that they violated Title 18, Section 2113, U. S. Code, by robbing the Almira Savings and Loan Association of Chicago, an association insured by the Federal Savings and Loan Insurance Corporation. Each was sentenced for a term of two years.

By their appeals defendants contend that the District Court erred in denying defendant McCarthy's motion to suppress government Exhibit 23, a finger and hand print card bearing his prints, which was used by a government witness to identify McCarthy through comparison with a palm print found on the window of the automobile being used to transport the association's money at the time it was taken from the driver.

The main contested issue is whether the prints on Exhibit 23 were obtained from defendant McCarthy by implied coercion in violation of his rights under the Fourth and Fifth Amendments.

The record discloses that Dennis Shanahan, a F.B.I. agent, suspected Miraglia and McCarthy. Some months following the robbery he called on McCarthy at the latter's place of residence. The defendant refused to talk about the robbery. Shanahan did not arrest the defendant but he requested McCarthy to accompany him to the F.B.I. office. McCarthy knew that he was not under arrest, that Shanahan had no warrant for his arrest, and that he did not have to go with him. Shanahan testified that McCarthy said: "[N]o, he wouldn't come down there, because if I took pictures of him, I would just show them to the witnesses, and he wasn't going to help me put him in jail". Shanahan testified that he then told McCarthy "that it wasn't much of a problem to get pictures and fingerprints of him . . . that in all probability the Chicago Police Department was equally interested in him and they could pick him up, in which case, if they did, and fingerprinted and photographed him . . . would have those made available to me through the normal course of business". McCarthy then accompanied Shanahan to the F.B.I. office where the prints were taken.

McCarthy, his wife, and her parents all testified concerning the conversation between Shanahan and McCarthy. Their testimony is in substantial agreement with that of Shanahan with the exception that the defendant and his witnesses state that Shanahan said that if McCarthy did not go with him he would have the police come and get him. Shanahan denied making such a statement.

On this disputed factual issue the matter of the credibility of the witnesses is for resolution by the District Court and so viewed the record furnishes substantial support for the findings and conclusions implicit in the denial of the motion to suppress. *United States* v. *Ziemer*, 7 Cir., 291 F. 2d 100. The interrogation took place in the defendant's home in the presence of members of his family. The record amply discloses that defendant knew he was not under arrest and under no obligation to accompany Shanahan to the F.B.I. office. Defendant admits he was not mistreated while there and was driven back to his residence after the prints were taken.

On the basis of the record before us we conclude that the District Court did not err in denying the motion to suppress. That McCarthy chose to accompany Shanahan when he was informed that the F.B.I. would receive his prints if he was picked up by local police does not establish coercion or duress or violation of any right of the defendant under the Fourth or Fifth Amendments. Defendant's claimed apprehension that if he was picked up by the local police he would be held overnight or mistreated furnishes no basis, on the facts here involved, for raising an implied coercion or duress.

Moreover, on an appeal from a judgment of conviction the evidence must be viewed in the light most favorable to the government. *United States* v. *Guido*, 7 Cir., 251 F. 2d 1. And, apart from the prints, there was independent identification of McCarthy as a participant in the robbery. The president of the association, Churan, who was transporting the money in a car driven by him, identified McCarthy as one of the men who committed the robbery.

Miraglia contends that since he was jointly tried with McCarthy the admission of McCarthy's prints in evidence adversely affected him. But Miraglia made no motion to suppress, and having raised no objection below he can not now be heard thereon. *Smyly* v *United States*, 5 Cir., 287 F. 2d 760.

The judgment of the District Court as to McCarthy and Miraglia is affirmed.

APPENDIX B.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Fourth Amendment to the Constitution provides in pertinent part:

> "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . ."

The Fifth Amendment to the Constitution provides in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

Section 2113, Title 18, U. S. Code provides in pertinent part:

> "(a) Whoever, by force and violence, or by intimidation, takes . . . from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management or possession of, any bank or any savings and loan association . . . shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 749

WILLIAM JOHN MCCARTHY AND JAMES ROCCO MIRAGLIA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 21–24) is reported at 297 F. 2d 183.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1961. A petition for rehearing was denied on January 29, 1962. The petition for a writ of certiorari was filed on February 26, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court could properly find that petitioner McCarthy's palm print, introduced into

evidence at trial for comparison with a print lifted from the surface of an automobile involved in the crime, was voluntarily given to federal officers.

STATEMENT

An indictment returned on August 10, 1960, in the United States District Court for the Northern District of Illinois charged petitioners with the robbery of $5,000 belonging to a federally-insured loan association, taken by force and violence from the person of one Rudolph Churan, the association president, in violation of 18 U.S.C. 2113. After a trial before the court, each of the petitioners was found guilty and sentenced to imprisonment for a term of two years (A. 1).[1] The court of appeals affirmed.

The government's evidence consisted primarily of the testimony of Churan and fingerprint evidence introduced by an expert examiner. Churan testified that, on September 18, 1959, while transporting association funds in his automobile, he was forced to a stop and robbed by two men in another automobile (A. 2–3). Churan identified the petitioners as the robbers (Tr. 21–22). The expert witness established that palm prints lifted from surfaces of the two automobiles matched those of the petitioners (A. 25).

Petitioner McCarthy moved to suppress the card bearing his palm print that was used by the expert for comparison, on the ground that the print had been taken from him in violation of his constitu-

[1] Record references "A" are to the certified copy of the appellants' appendix in the court below. "Tr." refers to the transcript of trial testimony which has also been certified to this Court.

tional rights (A. 14). After hearing evidence on the motion, the court overruled it (A. 24). The evidence pertinent to the motion to suppress was as follows:

F.B.I. agent Shanahan, who had investigated the robbery, testified that after attempting to get in touch with petitioner McCarthy for several months he had found him at home on June 15, 1960 (A. 13). Shanahan stated that McCarthy's father-in-law was present but not within earshot of the ensuing conversation and that he did not recall anyone else's being present (A. 13, 16). The agent testified that McCarthy refused to talk about the robbery and that, when he asked McCarthy "if he would care to accompany me down to the office" for photographing and fingerprinting, McCarthy declined, saying "he wasn't going to help me put him in jail" (A. 13). Shanahan testified that he told McCarthy (*ibid.*) that

> it wasn't much of a problem to get pictures and fingerprints of him inasmuch as the violation [that Shanahan was investigating] * * * was also a local violation, and that in all probability, the Chicago Police Department was equally interested in him and they could pick him up, in which case, if they did, and fingerprinted and photographed him, I would have those made available to me through the normal course of business.[2]

[2] Shanahan testified that he was at that time unaware of any arrest process or charge outstanding against McCarthy (A. 17), but that he knew (although there is no testimony that he told McCarthy) that the city robbery detail was also investigating the robbery (A. 16).

The agent testified that he made no threat to force or induce McCarthy to go with him to F.B.I. headquarters (A. 22), and he denied having told McCarthy that he would have him picked up by the police if he refused to go with him (A. 17, 22). Agent Shanahan testified that McCarthy then accompanied him to the F.B.I. office in the agent's car (A. 14, 22); McCarthy was under no restraint on the way to the office (A. 22). After McCarthy's fingerprints, palm prints and a photograph were taken, he was driven back to his residence (A. 14, 22).

Petitioner McCarthy, his wife, his father-in-law and his mother-in-law all testified in varying but substantially similar terms that they were in the apartment during the conversation and that agent Shanahan had told McCarthy that if McCarthy did not accompany him to F.B.I. headquarters the agent would have the local police pick him up.[3] Petitioner McCarthy testified that the agent did not have a warrant for his arrest. He also testified that, in the course of the conversation, he asked Shanahan whether he was

[3] According to the wife, Shanahan said, "If you don't come with me, I will have the police come and take you and you know what that means * * *" (A. 20). According to the father-in-law, Shanahan said, "Well, if I come back with the officers you can stay in jail overnight. You are better off to go now" (A. 20). According to the mother-in-law, Shanahan said, "Well if you don't, then I will have to have the police come here and get you" (R. 19). According to petitioner McCarthy, Shanahan told him that "I could go with him or he said he would have the bureau pinch me, the detective bureau"; he said the agent promised him that "[i]f I went with them * * * I would come home right away" (A. 21).

under arrest and Shanahan replied that he was not (A. 21). McCarthy testified that he was not mistreated while he was at F.B.I. headquarters (A. 22).

ARGUMENT

The petitioner McCarthy renews in this Court his contention, rejected by both courts below, that the card bearing his palm print should have been suppressed at trial as having been secured in violation of his rights under the Fourth and Fifth Amendments. The sole issue presented by that contention is whether the district court, on the basis of the evidence before it, could properly find that this petitioner voluntarily and intelligently assented to having his palm print taken by the F.B.I.

The total facts and circumstances here amply support such a finding. The record in no way suggests an atmosphere of physical or moral compulsion. The conversation in question took place at petitioner McCarthy's home. There was no pretense about the agent's purpose in being there; he wished to talk with McCarthy about the crime he was investigating, and McCarthy refused to talk about it, as was his privilege. There is no suggestion that the agent was anything but courteous. There was at least one member of McCarthy's family on the premises at the time; according to the defense witnesses, several of them were in the room during the conversation. It is undisputed that petitioner was invited—not ordered—to accompany the agent to his office for the sole purpose of taking photographs and fingerprints, that he went under no physical restraint whatever, and that he was

immediately returned to his home thereafter. It is likewise undisputed that petitioner, whose testimony indicates that he was not completely unfamiliar with law enforcement procedures (A. 21–22), knew that he was not under arrest and that he did not have to accompany the agent.

The only disputed issue of fact is whether the federal agent told petitioner McCarthy that, unless he went to the F.B.I. office to be photographed and fingerprinted, the agent would have the local police pick him up. As the court below held, the credibility of the witnesses was for the district court to determine (Pet. 23), see *United States* v. *Ziemer*, 291 F. 2d 108 (C.A. 7). The court was entitled to disbelieve the testimony of petitioner McCarthy and his close relatives and to prefer the testimony of the agent that he made no threat but merely reminded petitioner of an obvious fact: that fingerprints on file with local authorities would be available to federal officers.

Moreover, even if petitioner McCarthy's version of events were believed, it would hardly support an inference of coercion under the circumstances here. It appears that McCarthy's only reason for regarding the agent's alleged statement as a "threat" was that, if he were picked up by the Chicago police, he would have to remain overnight, while the F.B.I. would not hold him at all (A. 21). Thus "threatened" with the possibility of detention by the Chicago police, he chose not to take his chances on his ability to contest the legality of such an arrest, but to remain free by cooperating with federal officers. This is not a situation where a finding of consent to being

fingerprinted would "not in accordance with human experience." See *Nelson* v. *United States*, 208 F. 2d 505, 509 (C.A.D.C.), certiorari denied, 346 U.S. 827, and cases cited therein. There was no mere passive or submissive acquiescence, suspect as having been given in response to an unceremonious demand under color of law to enter and search private living quarters. See *Johnson* v. *United States*, 333 U.S. 10. There was no invasion of petitioner's body without his knowledge or consent, such as might plausibly give rise to objection under normal circumstances. Cf. *Breithaupt* v. *Abram*, 352 U.S. 432, 435–36. This was a conscious election by an apparently sophisticated person to take positive action in cooperating with federal officers in routine matters of identification.

There is no valid basis for petitioner Miraglia's contention that, if petitioner McCarthy's palm print was introduced into evidence illegally, the conviction against Miraglia is "tainted" (Pet. 19). Petitioners have suggested no way in which this evidence against McCarthy affected Miraglia, simply because they were tried together. The fingerprints that were used to identify Miraglia at trial were obtained only after an F.B.I. arrest whose validity has not been contested (A. 15–16).[4] Moreover, as the court below found

[4] Agent Shanahan testified that he had asked Miraglia to come to F.B.I. headquarters to be photographed and fingerprinted, but Miraglia had refused to do so (A. 13). Shanahan said he was later informed by the city police that Miraglia had come in to them and voluntarily given his prints (A. 23). The agent testified that he had received copies of these prints from city police a few weeks later (A. 18). It does not appear that these prints were ever used for identification.

(Pet. 24), petitioner Miraglia did not voice this objection at trial. He cannot do so for the first time on appeal.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1962.